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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1102

BYRON HAHN, also known as SOON K. HAHN, and SUSAN HAHN, his wife, *Petitioners*,

v.

JOHN W. BIHLMIRE, Assignee of Lloyd D. Miller, Assignee of First National Bank of Madison, Wisconsin, Guardian of Harry Newman, Incompetent, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF WISCONSIN

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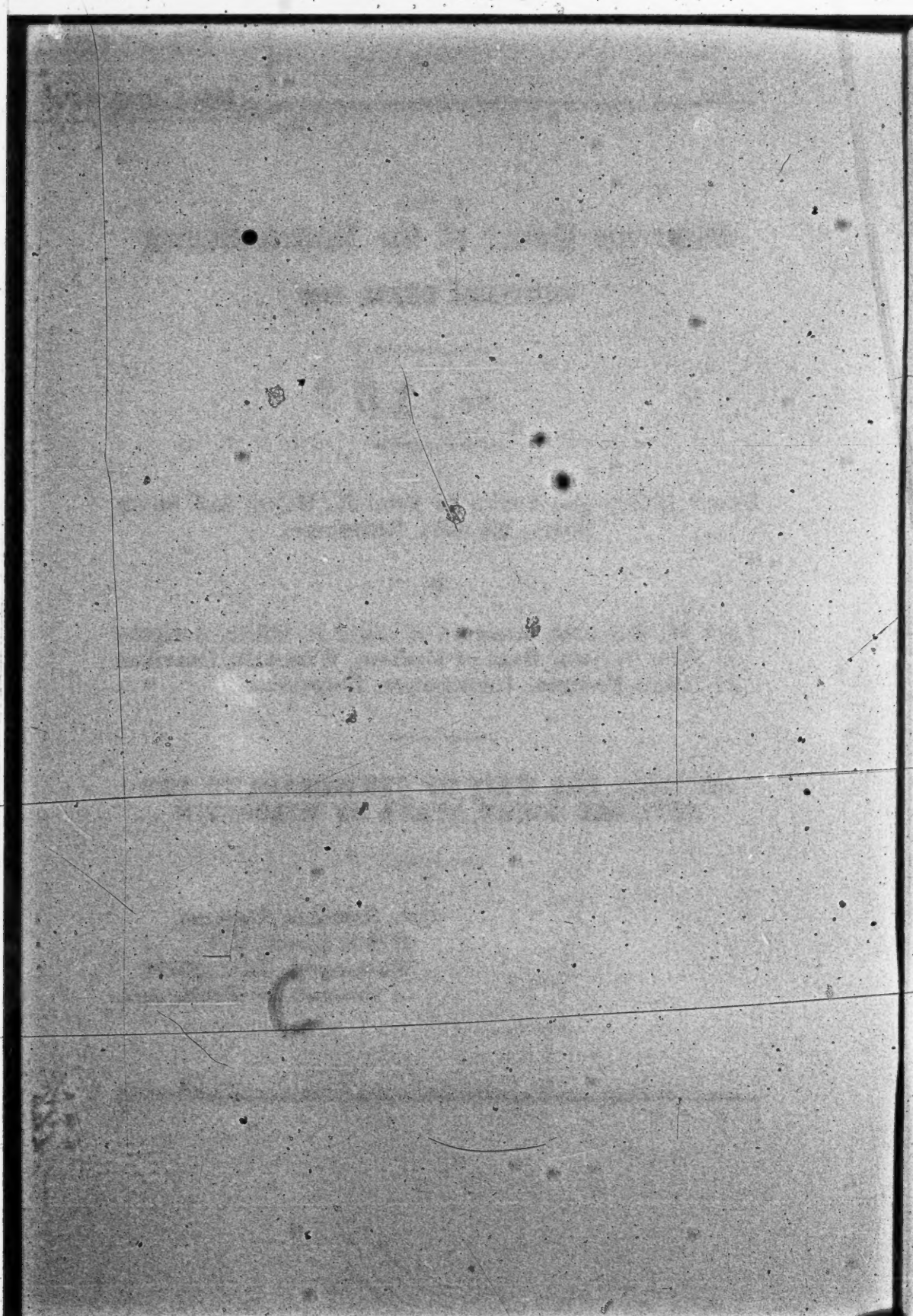

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF WISCONSIN

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Your petitioners were appellants before the Supreme Court of the State of Wisconsin. That Court affirmed an order of the Walworth County Court confirming the judicial sale to respondent of real property theretofore owned by petitioners.

Two substantial federal questions are relied upon for the grant of a writ of certiorari herein and arise from the potential deprivation of petitioners' property by reason of

(a) a conflict between the procedures of the Wisconsin courts and the United States District Court for

the Eastern District of Wisconsin in a pending bankruptcy action against the petitioner Soon K. Hahn; and

(b) the denial to petitioners of the basic common law requirements of a fair trial within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution.

Opinions Below

The judgment of the Supreme Court, State of Wisconsin, together with the denial of a rehearing thereon, are printed in the Appendix. The opinion is officially reported as *Bihlmire* v. *Hahn et al,* 31 Wis. (2d) 537, (No. 269, August Term, 1966); and unofficially reported in 143 NW 2d 433. The order and opinion of the County Court of Walworth County, Wisconsin, are printed in the Appendix. It has not been officially reported.

In addition to the docketing of the record before the Supreme Court of Wisconsin, ('R') a Supplemental Record of certified copies of proceedings in the United States District Court, and the subsequent contempt order against respondent in the Walworth County Court are also being docketed herewith—('SR').

Jurisdiction

The opinion of the Wisconsin Supreme Court was filed July 1, 1966, and petitioners motion for rehearing and motion to amend the mandate was denied September 30, 1966. By order of Mr. Justice Clark, entered herein December 29, 1966, petitioner's time to file the within petition was extended to and including February 27, 1967.

The review authority of this Court arises under 28 U.S.C. §1257(3), and the remand to the Wisconsin court for a

hearing on petitioner's defense which is prayed hereby is authorized by 28 U.S.C. §2106.

Questions Presented

1. Whether a federal court in dismissing a bankruptcy action under 28 U.S.C. 1359 for collusive instigation, has residual jurisdiction to restore the alleged bankrupt to the status he held in a state court preceding the fraudulent filing.

2. Whether a state court denies petitioners a fair trial in the constitutional sense, or preempts an exclusively federal jurisdiction, by foreclosing petitioners from proving as an equitable defense the collusive instigation of a federal bankruptcy proceeding brought against them—for the purpose and with the result that petitioners' land was judicially sold to the instigator.

3. Whether petitioners were denied a fair trial in the constitutional sense by failure of the state trial court to prevent respondent from sending the judge before decision a series of personal letters slandering the petitioners, and if so, whether any such error has been cured by the subsequent holding of respondent in contempt after a confirmation of the sale of petitioners property to him.

Statutes Involved

Constitution of the United States

Article I, Section 8

"The Congress shall have Power . . .
To establish . . . uniform laws on the subject of Bankruptcies throughout the United States; . . ."

Amend. Article [V]

"No person shall be . . . deprived of . . . property, without due process of law; . . ."

Amend. Article [XIV]

"Section 1. . . . nor shall any State deprive any person of . . . property, without due process of law; . . ."

U.S. Code

11 U.S.C. §110 (Bankruptcy); Title to Property.

"(a) The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition indicating a proceeding under this title . . . to all the following kinds of property wherever located . . .

". . . .

"(3) powers which he might have exercised for his own benefit,

". . . .

(6) rights of action arising upon contracts . . .

". . . .

"The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court." (July 1, 1898, c. 541 §70, 30 Stat. 565; as am.)

18 U.S.C. §152 (Crimes; Bankruptcy) Concealment of assets; false oaths and claims; bribery.

". . .

"Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, ad-

vantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding;

"...

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

(As am. June 12, 1960, Pub. L. 86-519, §2, 74 Stat. 217; Sept. 2, 1960, Pub. L. 86-701, 74 Stat. 753.)

28 U.S.C. §1257. State courts; appeal; certiorari.

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

...

(3) By writ of certiorari, ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(June 25, 1948, c. 646, 62 Stat. 929).

28 U.S.C. §1359. Parties collusively joined or made.

"A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

28 U.S.C. §1651(a). Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of

law." (June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, §90, 63 Stat. 102).

28 U.S.C. §2106. Review: Determination.

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." (June 25, 1948, c. 646, 62 Stat. 963.)

Statement of the Case

1. Sale of the Property

Petitioners, Korean-Americans, have for many years owned the equity of property known as Korean Village located in Lake Geneva, Wisconsin. In 1964, respondent purchased a ten-year-old mortgage judgment against the property and secured an order for a judicial sale. At such sale on June 9, 1964, petitioners made the high bid of $35,000. Petitioners deposited $4,000 on their purchase and applied for a loan on the property to finance the balance of their bid. (R. 221, 223)*

However an involuntary bankruptcy proceeding had been filed against petitioner Hahn on September 19, 1964 (R. 177) in the United States District Court for the Eastern District of Wisconsin (No. 64-B-1876). This proceeding—which is still pending—made it impossible for petitioners to

* To secure a corporate guaranty for such a loan, a nominal transfer of the property was made to Trapsasia Trading Corporation. This did not affect the status of the property with respect to the then pending proceedings or the questions raised herein.

secure the financing required for the consummation of their purchase of Korean Village (R. 223) having been reported by Dun & Bradstreet.

Petitioners continued to seek financing from various sources (R. 221) but were blocked by the pending bankruptcy. Nevertheless they did finally secure a mortgage commitment of $40,000 from the First Federal Savings and Loan Association of Racine, insured by Kansas City Title Insurance Company (R. 169). But this commitment was made subject to the condition that:

> "2. Proof must be furnished that there are no bankruptcy proceedings in the Federal District Court for the Eastern District of Wisconsin, either voluntary or involuntary, in the matter of Soon K. Hahn or Byron Hahn, or if such proceedings have been instituted that the claim of the Federal Court or its agents has been released as to the property in question." (App. 170)

On December 8, 1964, on respondent's motion, the Walworth County Court gave petitioners ten days to pay the balance (R. 119), and ruled:

> "IT IS FURTHER ORDERED, that in the event that Mr. Hahn fails to pay the balance of $31,000.00 into Court within the time set by the Court, then the Four thouand ($4,000.00) that he has already paid into Court as a down payment shall be forfeited and shall be paid by the Clerk to Mr. Bihlmire to apply on the Judgment that he now has." (R. 121)

Petitioners could not meet the terms of the order, and on respondent's further motion, the Court ordered a resale with a minimum deposit of $10,000. At such resale respondent bought in the property for $29,000 and moved to confirm the sale to himself (R. 143). This was heard on

August 5, 1965 (R. 161), the confirming order was filed September 20, 1965, and such order was appealed and affirmed by the Supreme Court of Wisconsin on July 1, 1966.

2. Instigation of the Bankruptcy Proceedings

The judicial sale of Korean Village to petitioners occurred on June 9, 1964, and the involuntary bankruptcy proceedings were filed against petitioner Byron Hahn on September 21, 1964. Nothing in the record indicates there was any evidentiary basis in December 1964 for petitioners to connect respondent with these proceedings or the consequent difficulty in financing the purchase of the land. Bihlmire held the mortgage on the property but was not a creditor of petitioner Hahn and not a party to the District Court action.

Subsequently, it became apparent on the record that the bankruptcy had been instigated by respondent to prevent consummation of petitioners purchase. Such items of proof are as follows:

a. On March 8, 1965 an order to show cause was filed by respondent's then attorneys, Trinke & Raup, in three courts, the County and Circuit Courts of Walworth County and the United States District Court, to require respondent to substitute other attorneys for them (R. 131-2). The affidavit filed with the motion stated in part (R. 132):

"Wm. F. Trinke, being first duly sworn on oath, deposes and says that he has been one of the attorneys for John W. Bihlmire, that this involved representation . . . in the following action now pending in the District Court of the United States for the Eastern District of Wisconsin, to wit:

1. Involuntary Bankruptcy pending against Soon K. Hahn, alleged bankrupt. No. 64-B-1876."

b. Respondent's attorneys also filed with these same courts a letter dated February 27, 1965, from themselves to respondent, reading in part (R. 129):

> "In regard to the bankruptcy action we appeared as attorneys for the petitioning creditors at your request and represented you in this matter. There is now a motion to dismiss the entire matter. It is therefore absolutely essential that if you want to keep this alive that you must appoint an attorney to immediately substitute for us."

c. Also filed were detailed billings of these attorneys to respondent for professional services (R. 176-178) including charges of $708.75 to respondent for preparation of the bankruptcy petition, securing signatures of creditors and payment of filing fees in the District Court.

d. On such motion the District Court entered its order in No. 64-B-1876 on March 19, 1965 (R. 179) relieving Wm. F. Trinke and the firm of Trinke & Raup of

> "any further obligations as attorney for John W. Bihlmire in the above entitled action."

(As noted, Bihlmire was not a party to that bankruptcy proceeding.) This order was later filed as an exhibit in the County Court proceeding (R. 213).

e. Messrs. Charne & Tehan, the attorneys substituted for respondent Bihlmire in the County Court (R. 187), also were substituted as attorneys for the petitioning creditors in the District Court (SR. 279).

f. Subsequently filed affidavits of bankruptcy petitioners (SR. 354).

(i)

"JOHN J. BYRNES being first duly sworn on oath, deposes and says:

. . .

"2. On or about October 16, 1964 he signed an intervening Creditors' petition in the above matter prepared by Trinke and Raup, then attorneys for John W. Bihlmire.

"3. The affiant had no intention to make an intervening Creditors' petition in bankruptcy court, however, he signed the petition solely upon the suggestion of Trinke and Raup who stated that all legal fees would be paid by his client John W. Bihlmire.

(ii)

EDGAR B. SCHILLER being duly sworn on oath, deposes and says:

. . .

2. That the affiant had no intention to make said petition, however, he signed upon the persuasion of Trinke & Raup who assured him that there would be no legal fees connected with same, and that he has not paid any legal fees in this connection to date to anyone.

3. That he, also, signed a paper on substitution of attorneys for Charney & Tehan upon same assurance that no legal fees would be paid by the affiant and that there would be no legal responsibility involved in signing the substitution of attorneys.

(iii)

"J. B. CHRISTIANS, being first duly sworn on oath, deposes and says:

. . .

"2. That he was the attorney for the late John S. Syver, on or about October 10, 1964, and he was approached by Mr. William Trinke of Trinke & Raup, Lake Geneva, Wisconsin, the attorneys then for John W. Bihlmire, and suggested that the affiant ask John S. Syver to sign the intervening Creditors' Petition which was prepared by Trinke & Raup. It was our clear understanding that John S. Syver was not to pay any legal fee on this matter as Mr. Bihlmire was paying for same.

. . .

"4. That he was the attorney for Willis R. Opitz, the executor of John Syver's Estate and that Mr. Opitz has not paid any amount of legal fee whatsoever to Trinke & Raup, former attorneys of John W. Bihlmire, nor to Charney & Tehan of Milwaukee, Wisconsin who are the present attorneys for John W. Bihlmire in the above proceedings.

g. Testimony of attorney Trinke before the Walworth County Court (R. 211)

"Mr. Bihlmire was with me at bankruptcy hearings in the Federal Court in Milwaukee, one as I recall. That's all I recall. I wouldn't know what date that was. The record will speak for itself. None of the *other* petitioners were with me at any of the bankruptcy hearings in Milwaukee." (Emphasis added)

3. *Confirmation of the Sale to Respondent*

The hearing to confirm the resale on July 1, 1965 of Korean Village to respondent for $29,000 was held in Walworth County Court on August 5, 1965. All of the items just referred to were before the court except the affidavits of petitioning creditors (f).

At such hearing, after calling Mr. Trinke to the stand, petitioners sought to raise an unclean hands defense with respect to respondent's instigation of the bankruptcy action (App. 205-208, 212):

"COURT: Well, how is this relevant in the first place?

"Mr. HAENSEL: Your Honor, we are intending to show that Mr. Trinke represented Mr. Bihlmire in certain matters dealing with the foreclosure matter of Mr. Byron Hahn, an officer and president of Transasia Corporation. This is a part of our contention—a major part of our contention that Mr. Bihlmire was guilty of maintenance in that he instigated a law suit in which he was not a party for the purpose of muddying the waters and making the title to the property in question unclear, and to prevent Mr. Hahn as the representative of Transasia Corporation from obtaining any financial backing for the purpose of redeeming this property.

. . .

"Mr. CHARNE: I am going to object to any conversation between Mr. Bihlmire and Mr. Trinke. Whatever is in evidence will speak for itself, and I object to Mr. Trinke testifying with regard to any conversation.

"COURT: On the grounds of privilege?

"Mr. CHARNE: On the grounds of privilege, your Honor.

"COURT: Objection sustained."

In addition to excluding the foregoing proffer of evidence, the court received the following question and answer given by Mr. Trinke (R. 210):

"Q. Mr. Trinke, I ask you whether or not you were employed by Mr. Bihlmire in regard to representation in a bankruptcy proceeding?

. . .

A. The answer is no."

Petitioners preserved the point for appeal by making an offer of proof (R. 208, 212), but absent the papers on file so excluded, and presumably relying on the oral denial of attorney Trinke, the County Court found (App. 103, 104):

> "The Court also specifically finds that Mr. Bihlmire is not guilty of champerty and maintenance, and that there is no credible evidence in the opinion of the Court to support this allegation."
>
> "The Court concludes that none of the arguments as set forth by the defendant are sufficient so that this Court should in equity deny the motion of the plaintiff for confirmation of this Sheriff's sale."

These rulings of the trial court were raised as error on the appeal (R. 167-8). They are not referred to by the Wisconsin Supreme Court in its opinion, and must be assumed under the general affirmance to have been approved.

4. *The Letters of Respondent to the Judge*

Prior to the resale of Korean Village to respondent, respondent wrote a series of personal letters to the judge, maligning petitioners (R. 133-137). These are set out in full as exhibits to respondent's subsequent contempt citation (SR 363-376, 380) together with the replies of the trial judge SR 377-379, 381-2).

The communications are as follows:

> (1) Telephone call from Mr. Bihlmire to Judge Zastrow on 1/19/65 berating him for allowing the receiver to rent property to Mr. Hahn (R. 171).
>
> (2) Telegram from Mr. Bihlmire to Judge Zastrow on 1/19/65 directing him to terminate receivership immediately (R. 171).

(3) Letter from Judge Zastrow to William F. Trinke and George L. Allen, the receiver, dated 1/19/65 telling them of the call and telegram and that he had told Mr. Bihlmire that it was improper for the judge to advise him (R. 171).

(4) Letter from Mr. Bihlmire to Judge Zastrow dated 1/18/65 showing copies to George Allen and Trinke & Raup, stating that the claims he holds are for an amount in excess of the value of the property, that Mr. Hahn is a professional litigant, that his family is by no means destitute, that in the last year he has spent $12,000.00 for litigation; that Judge Zastrow is extremely prejudiced and not qualified or competent in this matter (R. 170, 135-136).

(5) Letter from Mr. Bihlmire to Judge Zastrow dated 1/19/65, showing copies to Trinke & Raup and Lake Geneva Regional News calling Mr. Hahn's bid a fraudulent bid and Mr. Hahn a fraudulent bidder (R. 170, 133-134).

(6) Letter from Judge Zastrow to Mr. Bihlmire dated January 21, 1965, showing copies to George Allen and William Trinke, acknowledging receipt of the letter of 1/18/65 and 1/19/65, stating that it is highly improper to discuss a pending case personally or by letter, and that if redress is sought it should be brought properly before the court (R. 153-154).

(7) Letter from Trinke & Raup to Mr. Bihlmire dated 1/25/65 stating that it is not right to contact judges directly and that they will not continue unless Mr. Bihlmire apologizes (R. 133).

(8) Letter from Mr. Bihlmire to Trinke & Raup, with copies to George Allen and Judge Zastrow dated 1/27/65, accepting resignation of Trinke & Raup; stating that Mr. Hahn has delinquent taxes in Lake Geneva of $80,000.00, that he has swindled naive elderly ladies

out of over $100,000.00, that he has a 20 year reputation of non-payment, that bankruptcy proceedings are pending against him, that he has the reputation of a professional litigant, that he recommends Judge Zastrow and George Allen for the Korean man of the year award (R. 133, 130).

(9) Letter from Mr. Bihlmire to Judge Zastrow dated 2/10/65 stating that the Judge and the receiver have gone out of their way to help Hahn and demanding a copy of any "contacts or deals made with Hahn" (R. 172).

(10) Letter from Judge Zastrow to Mr. Bihlmire dated 2/12/65 showing copies to William Trinke and George Allen stating that if he desires possession of the property it is his suggestion that Mr. Bihlmire initiate the sale of the property by the sheriff; that this can be accomplished in a very short time, etc., that if an exception is made to the court's ruling the proper procedure is to bring the objection before the court upon notice (R. 172-173).

(11) Letter from Mr. Bihlmire to Judge Zastrow dated 2/16/65, showing copy to George Allen stating that the court and the receiver have acted in bad faith and that Mr. Hahn has possession of property in Lake Geneva which has cost other people over $100,000.00 (R. 174).

(12) Letter from Trinke & Raup to Mr. Bihlmire dated 2/27/65 with copies to Norman Barry, Judge Watts, Judge Zastrow and George Allen requesting that new attorneys be hired immediately (R. 130-131).

(13) Letter from Mr. Bihlmire to Trinke & Raup dated 3/4/65 showing copies to Judge Watts and Judge Zastrow stating that Judge Zastrow has acted contrary to law with respect to helping Hahn (R. 174).

(14) Letter from Mr. Bihlmire to Judge Zastrow

dated May 20, 1965, advising the judge that he has now purchased $40,000 in liens, that Mr. Hahn has a history of corrupting judges and attorneys, that he was told by a local attorney who has a suit against Hahn that Hahn offered him $1000.00 to take action to protect Hahn, that the judge's conduct has been dishonest and cowardly, that if his complaints are not remedied that he will take steps to remove the judge from the bench, that two minor girls of ages 12 and 5 are living on the premises, their mother is in Korea and their father for the most part is in New York. (R. 175).

(15) Letter from Judge Zastrow to Mr. Ed Chess, Department of Public Welfare, Elkhorn, Wisconsin, dated 5/27/65 stating that there is much animosity between Bihlmire and Hahn; that he had received a letter from Bihlmire concerning two minor girls, ages 5 and 12 living in the Korean Village without supervision, that he does not know if there is any basis for the claim, but that Mr. Bihlmire is a rather volatile individual and he would appreciate it if Mr. Chess would send a worker to investigate (R. 154-155).

(16) Letter from Judge Zastrow to Mr. Bihlmire dated 5/27/65 showing a copy to Charne and Tehan acknowledging receipt of the May 20 letter and stating that the proper procedure when disagreeing with the court's rulings is to bring objection to the court on notice; that he had signed an order for resale; that he assumes that the sale will be followed shortly by proceedings to confirm; that he is having the complaint about the children investigated (R. 155-156).

(17) Letter from Mr. Bihlmire to Judge Zastrow dated 6/2/65 stating that it is apparent that he is going to protect Hahn, that juvenile workers are not qualified to determine who is a proper custodian, that he is going

to proceed immediately with necessary steps to remove the judge from the bench (R. 185).

(18) Letter from Charne & Tehan to Judge Zastrow, with copy to Mr. Bihlmire, dated June 9, 1965, stating that Mr. Bihlmire has assured them that thereafter all communication will be handled through their office (R. 157).

(19) Letter from Charne & Tehan to George Allen dated 7/26/65, with a copy to Judge Zastrow, protesting Mr. Hahn's use of the premises to rent rooms (R. 157-158).

(20) Letter from Charne & Tehan to George L. Allen, with copy to Judge Zastrow, stating that the receiver will be held accountable for waste (R. 158).

(21) Letter from Trinke & Raup on behalf of receiver to Judge Zastrow dated 7/20/65 stating that a $300 check written by Mr. Hahn had been drawn on uncollected deposits (R. 153).

(22) Letter from Edward Chess, Director, Walworth County Department of Public Welfare dated 8/9/65 stating that on May 24th their worker found a girl 15 and a girl 5 at the Korean Village, that there was no evidence of neglect on the part of Mr. Hahn who would be away for short periods and that the girls returned to Korea to remain with their mother in late June (R. 159-160). (This letter came after the trial on confirmation of sale).

(23) Letter from Mr. Bihlmire to Judge Zastrow dated 10/29/65 enclosing a utility bill and stating that he will not tolerate the creating of liens by the court or receiver and asking for the name of the surety of Mr. Allen's bond (R. 158-159).

(24) Letter from County Judge to Irvin B. Charne dated 11/10/65, showing a copy to Mr. Bihlmire, enclosing a copy of Mr. Bihlmire's letter (R. 159).

5. *The Present Status*

The Walworth County Court is informally withholding consummation of the sale to respondent pending the outcome of this petition.

The bankruptcy court has a pending motion to dismiss by petitioner Hahn under 28 U.S.C. §1359 because of the fraudulent instigation of the proceeding. (S.R. 288).

Respondent has been held in contempt by the Walworth County Court (S.R. 361).

Federal Questions Raised Below

The asserted collusive instigation of the federal bankruptcy proceedings by respondent, as an equitable bar to confirmation of resale to him and objection to the court's exclusion of evidence on such defense was asserted before the lower court by offer of proof (R. 205-207), preserved by notice of appeal from the decision of the County Court (as well as from its formal order) which ruled against it (R. 167-168), was cited as point 9 to the Wisconsin Supreme Court in Respondents' brief, but was not referred to or affirmatively passed on in the judgment from which certiorari is here sought.

The unconstitutional denial of a fair trial in the due process sense of the Fourteenth Amendment to the Constitution of the United States by failure of the trial court to either disqualify itself or terminate the writing of slanderous letters by respondent to the judge was moved as a defense to confirmation of resale to respondent (R. 202-3), ruled against by the trial court (R. 103), included in the notice of appeal from the decision (R. 167-8); argued as point 1 on appeal, and ruled on against petitioners by the Wisconsin Supreme Court in the judgment from which review is here sought, (App., R. 250-251). While that court did not make reference to the constitutional nature of the

claim, the phrasing of this argument in petitioners brief in that court referred to denial of "fair hearings in the court below, in contravention to the due process requirements of the Wisconsin and United States Constitution . . ." (App. Br. p. 3).

Argument

The only relief available to petitioners from the asserted fraud of respondent is for them to have the opportunity to be heard in a proper trial upon that assertion, and if petitioners then establish it, to obtain an order which will restore the status of the parties as of the filing of the bankruptcy petition. The present status of the cases however is such as to make the writ powers of this court essential to its accomplishment.

In order to meet the requirements of financing the balance of $31,000 on their purchase of Korean Village, petitioners have been obliged to seek a dismissal of the bankruptcy action under 28 U.S.C. § 1359 for lack of jurisdiction in the district court. Such action on their part, however, creates a legal dilemma between state and federal jurisdiction in that the very proof of respondent's fraud may become the means whereby respondent accomplishes the purpose for which the bankruptcy action was instituted. This question is treated under Point 1 below.

As to the supplemental basis for relief from the state court determination by an equitable restoration of the status of the action prior to the filing of the petition in the district court, your petitioners rely on two incidents at the hearings confirming the resale to respondent, which, in the view of your petitioners, constitute the denial to them of a fair trial within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution. These two errors, the foreclosing of petitioners' fraud defense, and the impropriety of the court's continuing correspond-

ence with respondent in which Hahn was maligned by respondent, are discussed in Point 2 hereunder.

1. *Residual Bankruptcy Jurisdiction*

In the ordinary course the jurisdiction of the District Court in the bankruptcy action would be clear. Section 70 of the Bankruptcy Act (11 U.S.C. § 110) is specific that petitioners' interest in the $4,000 deposit and the related right of redemption of Korean Village which existed on the date of the filing of the petition in the District Court would be vested as of that date by operation of law in any trustee thereafter appointed by the Court, *Merchants National Bank* v. *Sexton*, 228 U.S. 634, 33 Sup. Ct. 725 (1913). Such title extends to the constructive as well as the actual possession of the alleged bankrupt, *Taylor* v. *Steinberg*, 293 U.S. 470, 55 Sup. Ct. 260 (1935), and such possession could not be disturbed by any subsequent process of the state court, *Gross* v. *Irving Trust Co.*, 289 U.S. 342, 53 Sup. Ct. 605, 90 A.L.R. 1215 (1933); *Harris* v. *Avery Brundage Co.*, 305 U.S. 160, 59 Sup. Ct. 131 (1938). It is for such a trustee to elect whether or not to assume an existing right of purchase (subject of course to any liens such as those held by respondent) which may be of advantage to the bankrupt estate, *Central Trust Co.* v. *Chicago Auditorium Assoc.*, 240 U.S. 581, 36 Sup Ct. 412 (1916), or redeem from a mortgage, *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 51 Sup Ct. 270 (1931). Thus while the filing of the petition in the District Court would not prevent enforcement of liens against the property which had existed more than four months, *Straton* v. *New*, 283 U.S. 318, 51 Sup. Ct. 465 (1931), those liens had already been enforced by the county court's order for judicial sale and the sale to these petitioners for $35,000. What remained

was the right of petitioners to pay the balance and secure the property. This right existed on the date of the filing of the bankruptcy petition and clearly would pass to the bankruptcy court as an asset of the alleged bankrupt, Hahn. Hence the forfeiture of his deposit and resale by the Walworth County Court would be void, at least to persons having notice of the pendency of the bankruptcy proceedings, including respondent.

Having knowledge of the prior institution of the bankruptcy action, the Walworth County Court in December 1964 and May 1965 would be without authority to destroy by resale an asset of a bankrupt's estate, i.e., the deposit and repurchase right of Hahn, and that Court's confirmation thereafter of title in respondent would also be void as against any trustee in the bankruptcy. But this presupposes a valid bankruptcy action to be pending.

The present case does not answer to such a simple solution. If the district court accepts the evidence that the bankruptcy action was instigated successfully by respondent for the purpose of destroying Hahn's right of redemption —or at least his ability to redeem—that court under the terms of 28 U.S.C. § 1359 may well have no jurisdiction either to stay consummation of the resale to respondent or to appoint a trustee of the supposedly bankrupt estate. In other words, if the suit was collusively brought, no property has passed by operation of law to the district court's receiver.

Thus respondent, having already achieved the purpose of his maintenance of the claims of the bankruptcy petitioners by securing a resale to himself in the county court, is now in the position where dismissal of the district court action on the basis of the same fraud would only solidify his title and thus make permanent the fruits of his fraud.

By curious corollary, the petitioners, if successful in securing such a dismissal, lose the very property they or their creditors could have redeemed through the district court if they had in fact been actually bankrupt.

So petitioners fall between the two stones of federal and state jurisdiction and lose their property unless this Court views the interaction of § 70 of the Bankruptcy Act and § 1359 of the Judicial Code as one affording the district court at least temporary powers of sequestration and of stay of the state court mandate under 28 U.S.C. § 2283—not so much in "aid" of a jurisdiction which may not exist, but to effectuate a judgment which in dismissing the bankruptcy action under § 1359 may yet restore the parties to the *status quo ante* of a fraudulent filing of the petition.

Concededly, petitioners find no direct authority for this proposition but point to this Court's decision in *Hartog* v. *Memory*, 116 U.S. 588, 6 Sup. Ct. 521 (1886). In that case plaintiff was an alien and jurisdiction of the district court depended on the citizenship of defendant. Only after a verdict had been entered against him did defendant reveal that he too was an alien and then successfully moved to dismiss for lack of jurisdiction in the court. This court reversed and remanded to at least grant plaintiff an opportunity to rebut defendant's new assertion and, but for an unnoticed reference to such alienage in the testimony, held that the defendant would have been estopped to plead the absence of jurisdiction.

Similarly, reference can be made to the analogous statement in 3 Pomeroy's Equity Jurisprudence (5th Ed. Symons) 614, (§ 919f) that:

> "It seems to be settled that where the owner of land is prevented from redeeming from a judicial sale thereof by the fraud of the purchaser, or one in privity

> with him, he may, on a bill in equity, be allowed to redeem after the expiration of the time fixed by law for redemption, on such terms as may be just and equitable."

and the cases cited from this Court would appear to support that general proposition; *Schroeder* v. *Young*, 161 U.S. 334, 16 Sup. Ct. 512 (1896); *Graffam* v. *Burgess*, 117 U.S. 180, 6 Sup. Ct. 686 (1886), although neither is on all fours with the present facts.

The *Hartog* case and *Pomeroy* suggest that a dismissal by the district court under 28 U.S.C. § 1359 is not necessarily a complete relinquishment of jurisdiction but that there may be an equitable residual jurisdiction remaining to estop or otherwise act against one who has fraudulently invoked the exclusive federal jurisdiction.

Petitioners therefore pray this Court to stay the mandate of the Wisconsin Supreme Court pending determination by the district court of the question of whether its bankruptcy jurisdiction has been collusively invoked, coupled with a direction that (a) if dismissal is required under 28 U.S.C. § 1359, the district court may nevertheless issue its order to the county court under 28 U.S.C. § 2283 restoring the parties to the status that obtained when the bankruptcy petition was filed, or (b), on a finding to the contrary, that the exclusive jurisdiction over the deposit and right of redemption of Korean Village is in the district court as an asset of the bankrupt estate.

2. *The Lack of a Fair Trial*

The requirements of "fairness" in a state civil trial under the due process clause of Amendment XIV to the United States Constitution are not as clearly spelled out

as in the criminal field, but the general criterion of *Snyder* v. *Massachusetts*, 291 U.S. 97, 105; 54 Sup. Ct. 330 (1934),

> "[A State] is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

is essentially that applied by this Court in civil cases. In Mr. Justice Holmes' opinion in *Saunders* v. *Shaw*, 244 U.S. 317, 37 Sup. Ct. 638 (1917), this Court found such a violation of due process to a petitioner who had "been deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence."

(a) *The Foreclosure of Petitioners' Defense.* This right to be heard is an essential of civil due process, *Hovey* v. *Elliott*, 167 U.S. 409, 417; 17 Sup. Ct. 841 (1897), and foreclosure of a defense by unjustified rulings on evidence has been held to be beyond the power of a state, *Western & Atl. R. Co.* v. *Henderson*, 279 U.S. 639, 49 Sup. Ct. 445 (1929); cf. *Bailey* v. *Alabama*, 219 U.S. 219, 233; 31 Sup. Ct. 145 (1911); *Manley* v. *Georgia*, 279 U.S. 1, 7; 49 Sup. Ct. 215 (1929); *Morrison* v. *California*, 291 U.S. 82, 88-89, 96-97; 54 Sup. Ct. 281 (1934); *Sperry* v. *State of Florida ex rel. Florida Bar*, 373 U.S. 379, 83 Sup. Ct. 1322 (1963). In the present case the County Court foreclosed the fraud defense of petitioners by excluding from evidence papers which had become part of the official records of the trial court. By so ruling, the Walworth County Court effectively passed on the question of the jurisdiction of the bankruptcy court. But the rule of exclusion used by the court was neither in accord with Wisconsin law or federal law and

constituted an arbitrary action effectually depriving petitioners of their property without being heard on their principal defense.

The trial judge excluded (R. 205-208, 212-213) a letter and billing charges prepared by respondent's attorney which stated the fact of his representations of respondent in instituting the bankruptcy action. These had been filed with the county court (as well as in the district court) with an order to show cause directed to respondent. Respondent did not then or at any later time move to strike these from the court's records as invading his privilege. On the contrary he accepted them by answering and allowing the order for substitution of attorneys to be entered upon them as proof.

Therefore, for four separate reasons these documents were admissible to establish petitioners' unclean hands defense.

First, the documents showed only the *fact* of representation of respondent, an aspect of the attorney-client relationship to which such privilege does not attach, *Behrens* v. *Hironimus,* 170 F.2d 627, (4 Cir. 1948).

> "The client or the attorney may be permitted or compelled to testify as to the fact of his employment as attorney, or as to the fact of his having advised the client as to a certain matter, or performed certain services for the client . . ."

As stated in *In re Colton,* 201 F.Supp. 13 (SDNY 1961), aff. 306 F.2d 633, cert. den. 371 U.S. 951, 83 Sup. Ct. 505,

> "It is usually held that the privilege does not extend to the fact of retention, or to a retainer agreement as evidence of the retention, since such information is required to enable the court to determine that the relation of attorney and client exists."

Second, the attorney representation to be shown was for the commission of a tortious or fraudulent act. The general rule as well as Wisconsin law is that no privilege attaches to such communications. As shown by the American Law Institute Model Code of Evidence (Rule 212), no privilege exists

> ". . . if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or to plan to commit a crime or a tort."

See also *United States* v. *Bob,* 106 F.2d 37 (2 Cir. 1939), cert. den. 308 U.S. 589, 60 Sup. Ct. 115:

> "It has always been settled that communications from a client to an attorney about a crime or fraud to be committed are not privileged. *Regina* v. *Cox,* 14 Q.B.D. 153; Wigmore on Evidence, (2d Ed.) § 2298; 1 Thornton on Attorneys, 212-215."

Specifically, the privilege does not exist as to communications to an attorney for the collusive instigation of a lawsuit, *Securities and Exchange Commission* v. *Harrison,* 80 F.Supp. 226 (D.C. D.C. 1948). The rule is the same in Wisconsin, *Dudley* v. *Beck* (1854), 3 Wis. 274, 286; *Koeber* v. *Somers,* 108 Wis. 497, 505-507, 84 N.W. 991. And, generally, "Applicability of Attorney-Client Privilege to Communications with Respect to Contemplated Tortious Acts," 2 A.L.R. 3d 861; Jones on Evidence, 4th Ed. § 753, pp. 1359-1360; 58 Am. Jur., Witnesses, § 515, p. 288.

It is true that extrinsic evidence is first required to show the probability of such retention, *United States* v. *Bob,* supra, Rule 212 A.L.I. Model Code. But this of course existed before the Walworth County Court since the order

of the district court relieving Trinke of the representation of respondent Bihlmire in the *bankruptcy* action had been filed as an exhibit in the county court together with the underlying affidavit of Trinke as to which he testified—without objection from respondent's attorneys (R. 213)—"I prepared an order and submitted it to the bankruptcy court for an order relieving me as attorney for John Bihlmire." Petitioners submit that such evidence coupled with Trinke's testimony and the other items previously listed, were, if not conclusive in themselves, sufficient extrinsic evidence to require the admission of the other documents showing specific details of Trinke's work in signing up the bankruptcy petitioners.

Third, the failure of respondent on return of the order to show cause to move to strike the papers submitted to the court by Trinke constitutes a clear waiver of any privilege that might exist as to them, 58 Am. Jur. 'Witnesses' (§ 523) p. 293; id. § 371, p. 218.

Fourth, the filing of these papers with three courts constituted a publication destroying any existing privilege, 58 Am. Jur. 'Witnesses' (§ 365) p. 216.

Petitioners submit that the action of the Walworth County Court in excluding evidence of their unclean hands defense against confirmation of a resale to respondent is so contrary to the fundamental principles of the common law as to constitute an arbitrary denial of a fair trial in the due process sense.

(b) *Impropriety of the Court:* Respondent's letters to the trial judge are characterized in the judgment from which this writ is sought:

> "Mr. Hahn claims that Mr. Bihlmire corrupted these proceedings by a series of improper communications to the trial judge. The record shows that Mr. Bihlmire sent eight letters and one telegram to Judge Zastrow.

> In these communications he characterized Mr. Hahn as a professional litigant and accused him of submitting a fraudulent bid. He also accused Mr. Hahn of neglecting his children and of having swindled naive elderly ladies of over $100,000. He asserted that Mr. Hahn had a twenty-year reputation of nonpayment and a history of corrupting attorneys and judges.
>
> "These communications also accused the trial judge of being prejudiced, incompetent and cowardly and asserted that the trial judge had made deals with Mr. Hahn. Mr. Bihlmire also threatened to have Judge Zastrow removed from the bench for his conduct in this case."

As this Court said in *In re Murchison*, 349 U.S. 133, 136; 75 Sup. Ct. 623 (1954),

> "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law . . . justice must satisfy the appearance of justice . . ."

The rule is made specific in the American Bar Association's Judicial Canon 17:

> "A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application."

Such a rule applies in Wisconsin, *James* v. *State*, 24 Wis. 2d 467, 473, 129 N.W.2d 227; *Estate of Eannelli*, 269 Wis. 192, 217, 68 N.W.2d 791 (1954).

Petitioners say that the action of the county court in failing to stop these letters or committing the case to another judge after they were received was a clear denial of the fundamental requirements of a fair trial. Petitioners do not concur with the Wisconsin Supreme Court that it is a question of fact on review whether the judge was corrupted by such tactics. It cannot restore the elements of a fair trial for the Wisconsin court to concede "that no judge or opposing party should be subjected to such improper attacks" and to recommend contempt proceedings.

Petitioners argue that a trial which deprives them of property without being heard free of such extra-judicial pressures cannot be "fair" in the constitutional sense. Whether the trial judge attempts to compensate in his mind for such attacks or, as here, sends out local officials to check whether respondent's canard regarding mistreatment of petitioners' children was correct, the even-handedness of justice has necessarily been destroyed and the punishment of defendant may restore the court's decorum but it does not compensate for the effect of the ruling on petitioners. From petitioners' point of view the matter of importance is the end result—that respondent's fraud in the bankruptcy and slander to the Wisconsin judge is to leave in his hands the land of petitioners toward the possession of which all of respondents' actions were directed.

A state judicial proceeding which could take the property of petitioners under these intolerable conditions is, in petitioners' view, a denial of "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," and constitutes the denial of a fair trial by due process standards.

• • • • •

The course of proceedings in the courts below has sanctioned and rewarded the collusive invocation of the jurisdiction of a federal court. It adversely affects the integrity of the judicial process, the administration of federal remedies and creates conflict between state and federal judicial power. Review by certiorari should be granted as prayed.

Respectfully submitted,

GEO. STEPHEN LEONARD,
Attorney for Petitioners.

SUPREME COURT OF WISCONSIN
(31 Wis. (2d) 537)

BIHLMIRE, Assignee, Plaintiff and Respondent, v. HAHN and wife, Defendants and Appellants: RAUP, Trustee, and others, Defendants: TRANSASIA TRADING CORPORATION, Impleaded Defendant and Appellant.

June 7—July 1, 1966.

APPEAL from an order of the county court of Walworth county: ERWIN C. ZASTROW, Judge. *Affirmed.*

This is an appeal from an order confirming a sheriff's sale resulting from the foreclosure of a mortgage on property known as the Korean Village, situated in Lake Geneva, Wisconsin.

The appellants, Byron Hahn and his wife, Susan, were the owners of the property at the time of the foreclosure action. On May 10, 1954, a judgment of foreclosure was entered against Mr. and Mrs. Hahn and in favor of the then holder of the first mortgage.

On April 20, 1964, an order was entered substituting John Bihlmire as plaintiff in the foreclosure judgment. That same order added to the judgment taxes, interest, and other charges which had been paid by the mortgagee for the years 1950 through 1962, so that the mortgage debt amounted to $21,217.37.

A sale was noticed and held on June 9, 1964. The property was sold to Mr. Hahn, the highest bidder, for $35,000, and he paid $4,000 as a down payment. The court entered an order confirming the sale on December 7, 1964, which provided that Mr. Hahn should pay the balance of the purchase price into court within ten days or forfeit the down payment. The balance of the purchase price was not paid.

In December, 1964, the court ruled that a receiver should be appointed for the property, and on January 12, 1965, the court entered an order which provided:

> "That the judgment and proceedings in this action are hereby amended so as to remove the requirement that on the sheriff's sale of the premises a down payment in the amount of only Four Thousand ($4,000.00) Dollars is required of the bidder."

On January 7, 1965, Mr. Hahn and his wife transferred the property to Transasia Trading Corporation, in which Mr. Hahn has a 40 percent interest.

Subsequently, another order for sale of the property was entered, and the sale was noticed to be held on July 1, 1965. Counsel for Byron and Susan Hahn petitioned the court to stay the sale and to modify the terms of sale by the sheriff which required a $10,000 down payment. A hearing was held, and the court denied the motions and in its decision stated:

> "As far as the contentions made by Mr. Hahn in this counter-petition, the Court does not feel that the contentions have merit to the point of delaying this Sheriff's sale any more. It is my feeling that this matter should proceed as quickly as possible to a Sheriff's sale, and if there is a high bona fide bidder, the matter shall be again returned to Court as quickly as possible on a motion for confirmation, and that this file once and for all be terminated or brought to a conclusion. Each of the respective motions of Mr. Hahn and the counter-petition is dismissed with costs."

The sheriff's sale was held on July 1, 1965, and the premises were sold to John Bihlmire, the highest bidder, for $29,000. The hearing on confirmation was noticed for July 20, 1965. Counsel for Mr. Hahn asked for additional time to prepare, and the confirmation was adjourned until August 5, 1965. At that time counsel for Mr. Hahn and Transasia Trading Corporation requested further adjournment, which the court denied.

Judge ZASTROW ruled that the sale should be confirmed. On November 15, 1965, Transasia Trading Corporation petitioned the court to review and vacate the order of con-

firmation. A hearing was held on this order on November 26, 1965, and the court denied the petition.

For the appellants there were briefs by *Orr, Isaksen, Werner, Lathrop & Heaney* of Madison, and oral argument by *Trayton L. Lathrop.*

For the respondent there was a brief by *Charne & Tehan* of Milwaukee, and oral argument by *Irvin B. Charne.*

GORDON, J.

Denial of a Fair Hearing.

Mr. Hahn claims that Mr. Bihlmire corrupted these proceedings by a series of improper communications to the trial judge. The record shows that Mr. Bihlmire sent eight letters and one telegram to Judg ZASTROW. In these communications he characterized Mr. Hahn as a professional litigant and accused him of submitting a fraudulent bid. He also accused Mr. Hahn of neglecting his children and of having swindled naive elderly ladies of over $100,000. He asserted that Mr. Hahn had a twenty-year reputation of nonpayment and a history of corrupting attorneys and judges.

These communications also accused the trial judge of being prejudiced, incompetent and cowardly and asserted that the trial judge had made deals with Mr. Hahn. Mr. Bihlmire also threatened to have Judge ZASTROW removed from the bench for his conduct in this case.

The trial judge comported himself in a scrupulously proper manner. As these messages were received the trial judge informed Mr. Bihlmire that such communications should not be made. He notified the opposing side. An account of each event was spread upon the record by the trial court. In addition, the trial court instructed Mr. Bihlmire to communicate with the court only through his own counsel, but Mr. Bihlmire did not respect that instruction.

At the oral argument on this appeal, Mr. Bihlmire's counsel acknowledged that Mr. Bihlmire's conduct toward the court could not be justified but urged that there was

no actual denial of a fair trial, pointing out that the communications were all made a part of the record and that no affidavit of prejudice was ever filed by Mr. Hahn.

We accept the trial judge's declaration that Mr. Bihlmire's communications had absolutely no effect upon his judgment, and we conclude that there was no denial of a fair trial. However, we are shocked at Mr. Bihlmire's demeanor and consider that no judge or opposing party should be subjected to such improper attacks. While we do not believe that the trial court was in fact corrupted by Mr. Bihlmire's campaign, it does not follow that a judge should be obliged to function in such an atmosphere.

When a litigant persists in the course which Mr. Bihlmire followed, especially after being informed of its irregularity, there would appear to be an intentional affront to the court which can and should be terminated or at least punished by the use of the power of contempt. "The big stick" exists to enable a court to enforce the fair and orderly administration of justice and to maintain such dignity and discipline as is essential to that end. It is our opinion that Judge ZASTROW should examine the course of conduct pursued by Mr. Bihlmire and determine whether a citation for contempt should issue. The initiation of such proceedings is within the discretion of the trial court. *O'Brien v. State* (1952), 261 Wis. 570, 577, 53 N. W. (2d) 534; see also *State ex rel. Reynolds v. County Court* (1960), 11 Wis. (2d) 560, 575, 105 N. W. (2d) 876; *Appeal of Cichon* (1938), 227 Wis. 62, 278 N. W. 1; *Rubin v. State* (1927, 192 Wis. 1, 11; 211 N. W. 926.

The Amendment of the Judgment.

Mr. Hahn contends that it was error for the trial court to remove the requirement contained in the original judgment that the down payment at the foreclosure be at least $4,000. We do not agree with this contention.

It is entirely proper for a trial court to concern itself via continuing jurisdiction over a mortgage foreclosure action. *Rio-Fall River Union Bank* v. *Hollnagel* (1940), 234 Wis. 181, 290 N. W. 636; *Plankinton Packing Co.* v. *Cincrete Corp.* (1937), 225 Wis. 239, 272 N. W. 836. Ch. 278,

Stats., and more particularly secs. 278.16, 278.162 and 278.165, contemplate the omnipresence of the course during the mortgage foreclosure sale and the confirmation thereof.

In view of the fact that a previous down payment of $4,000 had been forfeited, the court was well within its discretion in eliminating the $4,000 figure from the judgment in regard to future sales. The order in effect put the sheriff back in the position covered by sec. 278.16, Stats., which provides that "the sheriff may accept from the purchaser at such sale as a deposit or down payment upon the same not less than $100." *Plankinton Packing Co.* v. *Cincrete Corp., supra* at pages 242, 243. In our opinion, it was proper for the court to modify the judgment in this regard and for the sheriff to require a $10,000 down payment at the second foreclosure sale in order to prevent a repetition of the prior inchoate sale.

Confirmation of the Sale Price.

Mr. Hahn contends that the price paid at the second foreclosure sale, $29,000, was unconscionably low and that the trial court erred in confirming such sale. It is also claimed that the trial court erred in excluding certain evidence offered by Mr. Hahn concerning the value of the property.

Mr. Hahn attempted to testify regarding various offers to purchase which he had received for the property from W.F. Best & Son, the city of Lake Geneva, and Hotton Realty Company, as well as various other offers to purchase. The offers ranged from $50,000 to $123,000. This testimony was excluded, and this was not error on the part of the trial court. In order to qualify as probative evidence, there must be a preliminary foundation of "the *bona fides* of the offer, the financial responsibility of the offeror, and his qualifications to know the value of the property." *Fox Wisconsin Theatres, Inc.* v. *Waukesha* (1948), 253 Wis. 452, 458, 34 N. W. (2d) 783; *Atkinson* v. *Chicago & Northwestern R. Co.* (1896), 93 Wis. 362, 367, 67 N. W. 703; *Watson* v. *Milwaukee & Madison R. Co.* (1883), 57 Wis. 332, 15 N. W. 468; Anno. 7 A.L.R. (2d) 781, 785.

Mr. Hahn also sought to have the court consider an appraisal of the property which had been made for a savings and loan association. An officer of the latter company was permitted to submit into evidence a tentative loan commitment by the association in the sum of $40,000, but the court rejected the proffered evidence that the said loan was based on a property appraisal of $84,000. The appraisers who had made the determination of the $84,000 figure for the savings and loan association were not in court and thus could not be cross-examined. We believe that it was appropriate for the trial court to have rejected the appraisal when offered by one who had not participated in such appraisal.

The property in question was transferred by Mr. Hahn to Transasia Trading Corporation and at the time of the transfer was valued by the parties to the transfer at $123,000. Mr. Hahn testified that he believed the property was worth $125,000. On the other hand, there was testimony offered by the assessor for Lake Geneva, who expressed the opinion that the market value of the property was approximately $36,000. The trial court concluded that "the bid price is not so grossly inadequate as to shock the conscience of this court, or to raise a presumption of fraud, inadvertence or mistake." Our review of the evidence convinces us that the trial court's conclusion must be affirmed. In *John Paul Lumber Co.* v. *Neumeister* (1900), 106 Wis. 243, 246, 82 N. W. 144, this court said:

> "The granting or refusing of an application to set aside such sale and order a resale, as a matter of favor, rests in the sound discretion of the trial court; and its determination will not be disturbed, except for a clear abuse of such discretion."

In *Gumz* v. *Chickering* (1963), 19 Wis. (2d) 625, 634, 121 N. W. (2d) 279, we delineated the situations which would justify a trial court in setting aside a sale, as follows:

> ". . . a trial court may refuse to confirm a sale if he is satisfied (1) that the price received for the property

was inadequate, and (2) that there was a showing of mistake, misapprehension, or inadvertence on the part of interested parties or prospective bidders.

"Moreover, under Wisconsin law a trial court has discretion to refuse to confirm such a sale even though there is no mistake, misapprehension, or inadvertence, where the sale price is not only inadequate, but is so grossly inadequate as to shock the conscience of the court."

Mere inadequacy of price is not ordinarily sufficient of itself to set aside a sale. *Anthony Grignano Co.* v. *Gooch* (1951), 259 Wis. 138, 140, 47 N.W. (2d) 895; *Welfare Building & Loan Asso.* v. *Gearhard* (1940), 235 Wis. 229, 235, 293 N.W. 813; *A. J. Straus Paying Agency* v. *Jensen* (1938), 226 Wis. 462, 466, 277 N.W. 105.

The appellants also complain that the court erred in not granting an adjournment so that further evidence as to value could be presented. The hearing on confirmation was originally scheduled for July 20, 1965, but was adjourned to August 5, 1965. It was a correct exercise of the trial court's discretion to deny any other request for adjournment. *Estate of Staniszewski* (1965), 28 Wis. (2d) 403, 406, 137 N.W. (2d) 57; *Schwarz* v. *Strache* (1957), 275 Wis. 42, 80 N.W. (2d) 797.

The trial court was familiar with this property and its troubled history. The foreclosure judgment had been entered in 1954, and thus many years transpired before the actual confirmation of the foreclosure sale. A previous foreclosure sale had produced a price of $35,000, but such sale was never consummated. Mr. Hahn's hope that another sale would provoke a higher bid was one in which the trial court understandably had little confidence. In *Northwestern Loan & Trust Co.* v. *Bidinger* (1937), 226 Wis. 239, 246, 276 N.W. 645, this court stated:

"Whether a resale of the premises would result in a higher bid is exceedingly problematical.

"If upon a resale no higher bids are made, that fact should be considered by the court when again called

upon to confirm a sale. *Kremer* v. *Rule, supra.* The mortgagee in the end is entitled to have the mortgaged property sold to satisfy his debt. *Guaranty Trust Co.* v. *Chicago, M. & St. P.R. Co.* (D.C.), 15 Fed. (2d) 434."

By the Court—Order affirmed.

COUNTY COURT, WALWORTH COUNTY
State of Wisconsin

ORDER CONFIRMING SALE, dated and filed September 20, 1965 (formal parts omitted)

The Sheriff of Walworth County, Wisconsin, having made and filed his report of sale and it appearing from said report of sale that the sale of the premises described in the complaint filed in the above-entitled action and in the judgment of foreclosure was in all respects regular and according to law and in conformity with the statutes and said judgment of foreclosure and sale,

And it further appearing that due notice of motion for confirmation of said sale was given by personally serving Eldred Dede, as Attorney for Mr. and Mrs. Byron Hahn, and pursuant to Section 278.165, Mis. Stats., by mailing by registered mail notice thereof to all other defendants who have appeared in this action or to their attorneys of record, more than five days prior to the date set for the hearing hereof, and that said notice contained all matters required to be stated therein.

And said matter having been set for hearing on the 20th day of July, 1965, at 10:00 A.M. and having been rescheduled at the request of Attorney Eldred Dede and heard on the 5th day of August, 1965, at 9:00 A.M. before the Hon. Erwin C. Zastrow, County Judge presiding, Charne & Tehan by Irvin B. Charne appearing for the plaintiff, John W. Bihlmire, and Lichtsinn, Dede, Anderson & Ryan by Peter C. Haensel and Henry C. Fuller appearing for the petitioning defendant, Trans-Asia Trading Corporation, and the defendant, Byron Hahn, appearing in person.

And the Court having heard the statements of counsel and being well and sufficiently advised in the premises makes the following findings of fact:

(1) That Trans-Asia Trading Corporation is the owner of record of the subject property.

(2) That defendant, Byron Hahn, has failed to pay real estate taxes since the judgment of foreclosure was entered on May 10, 1954; in fact, all taxes plus interest, have been paid since 1954 by the holders of the first mortgage.

(3) There is nothing binding on the part of the Racine lending institution in the nature of a financial commitment to allow the necessary money to redeem the property.

(4) There is nothing in the record indicating that the Sheriff's demand for a $10,000.00 down payment at the time of the Sheriff's sale in any way affected or chilled the bidding at the said sale.

(5) The plaintiff, John W. Bihlmire, because of his conduct toward the Court, in no way hindered the defendant in his financing.

(6) The allegations that the conduct of John W. Bihlmire concerning the acts of the Receiver, the letters to the Receiver and statements about the Receiver, and the encumbering the Stone Manor property had an adverse effect upon the defendant's ability to refinance are not supported by credible evidence.

(7) John W. Bihlmire is not guilty of champerty and maintenance.

(8) John W. Bihlmire was not proceeding upon a course of conspiracy regarding the Stone Manor so as to affect the defendant's ability to refinance the Stone Manor or Korean Village property.

(9) The fair value of the premises in the above-entitled matter is $36,000.00.

(10) There was no showing of mistake, misapprehension or inadvertence on the part of any interested parties or prospective bidders.

(11) The bid price is not so grossly inadequate so as to shock the conscience of this Court, or to raise a presumption of fraud, inadvertence or mistake.

Upon the record and upon a complete consideration of all of the testimony presented:

IT IS ORDERED:

That Trans-Asia Trading Corporation is interpleaded as a party defendant.

IT IS FURTHER ORDERED, that the motions of said interpleaded defendant for any continuance of these proceedings be denied.

IT IS FURTHER ORDERED, that the Sheriff's Sale is hereby confirmed forthwith. It is ordered that the deed held by the Clerk of the Court shall be delivered to the plaintiff. A Writ of Assistance will issue. The $10,000.00 down payment will remain with the Court. That the Court finds at this time that there is due the plaintiff the sum of $25,366.74 as of July 1, 1965, plus interest to this date. That counsel for the plaintiff will take steps to bring on by motion a hearing with reference to the final determination of the amount owing the plaintiff, his request for additional attorney's fees, and the adjudication of the surplus, if any, and a hearing with reference to anyone who has any interest in any surplus.

IT IS FURTHER ORDERED that the Receiver's account as filed by the Receiver is approved. That upon payment into Court of the amount held by the Receiver, the said Receiver will be dismissed, his bond be discharged, and his account approved in all respects.

• • • • • • •

COUNTY COURT, WALWORTH COUNTY
State of Wisconsion

OPINION OF THE COURT

(Formal parts not printed)

Let the record show that the Court has been closely involved with this case. There have been many hearings before the Court and several of those hearings, where the decision has been given from the Bench, the Court noted, for the record, that this Judgment of Foreclosure was entered in 1954. I believe May 14th of 1954. Also, the Court on numerous occasions has commented on the fact that Mr. Hahn, the defendant, has failed to pay real estate taxes throughout this entire period. All of the real estate taxes in fact, plus interest, have been paid since 1952, I believe, by holders of the first mortgage. As I have stated before, and I state at this time, that this is not an ordinary mortgage foreclosure proceeding as we know them. This matter has been before the Court many times, and it seems to me that each time, as we move closer toward a Sheriff's sale and a final completion of this file, the defendant is constantly asking for additional time. The Court, I feel, has been very lenient throughout these proceedings in attempting as best the Court could within reason to give the defendant time in which to redeem this property. Now we come to the final proceeding—the final hearing where the plaintiff is asking that the Sheriff's report be confirmed, and here again as was true in many of the preceding proceedings, the defendant is again asking for additional time to redeem. As I stated earlier this morning, it seems to the Court that in this so called commitment on the part of the lending institution from Racine, there is nothing binding. Many things could happen between now and three weeks from now. There is nothing that would guarantee that this defendant, or whoever owns this property, would come up with the necessary money to redeem. It seems to the Court that we need something a little more firm and definite before the Court could grant a continuance, and on that basis I denied the motion of the defendant this

morning to continue this matter, and I still feel the same way this afternoon.

With reference to the contention of the defendant that the provision of the Notice of Sale made by the sheriff, requiring a $10,000.00 down payment is arbitrary and did have an adverse effect upon the bidding, in answer to that argument the Court still is of the belief that Section 278.16 (1) of the Wisconsin Statues gives this discretion to the Sheriff and, in fact, as I read the statute and the case law, the sheriff could in his discretion demand the entire purchase price. This was the law prior to the time, or up to the Depression and during the Depression, and that was the reason that this statute was amended to give the authority to the sheriff to demand less than the entire purchase price. The Court finds nothing in this record that this requirement on the part of the sheriff to demand a $10,000.00 down payment at the time of the sheriff's sale in any way affected the bidding, or any way chilled the bidding. The Court specifically finds that this was not an abuse of his discretion, and that such requirement as provided for by the sheriff to demand the $10,000.00 is not a basis for setting aside the sheriff's sale.

With reference to the argument of the defendant that the conduct of the plaintiff was such that this Court should not give equity, I recognize the things that he has said about this Court and about the Judge, and I can say emphatically that whatever he said about the Court or about the Judge had absolutely, and has absolutely no effect upon my judgment either one way or the other. I believe the tone of my letters that are part of this record in answer to the letters of Mr. Bihlmire set forth my feeling that if he has any objection to what this Court has done in these proceedings, that he had a perfect right to bring those objections properly before the Court upon notice to the adverse parties. The Court specifically finds that the plaintiff, because of his conduct toward the Court, in no way hindered the financing or hindered the defendant in his financing.

There have been allegations made by the defendant, because of various acts of conduct on the part of Mr. Bihl-

mire encumbering the Stone Manor property, and acts concerning the Receiver, and Mr. Bihlmire's letters to the Receiver, or his statements about the Receiver, did have an adverse effect on Mr. Hahn's—or upon the defendant's ability to refinance. These allegations have been made and the Court finds from this record that these allegations are not supported by credible evidence. The Court also specifically finds that Mr. Bihlmire is not guilty of champerty and maintenance, and that there is no credible evidence in the opinion of the Court to support this allegation..

There has been much testimony regarding the Stone Manor property. The Court allowed this testimony to come in. I had my doubts at the time as to whether or not it was material, but I allowed it to come in and be made a part of this record. Upon reflection the Court finds that this testimony with respect to the Stone Manor property would not support a finding that Mr. Bihlmire was proceeding upon a course of conspiracy so that the defendant might not be able to refinance the Stone Manor property or the Korean Village property.

The Court concludes that none of the arguments as set forth by the defendant are sufficient so that this Court should in equity deny the motion of the plaintiff for confirmation of this Sheriff's sale.

With reference to the testimony on fair value, the Court specifically finds that the only credible evidence in this record with reference to fair value of this property was the testimony of Mr. Ketchpaw, the assessor of the city of Lake Geneva. The Court finds that the fair value of this property as of the date of the last Sheriff's sale to be Thirty-six thousand ($36,000.00) Dollars. The Court has read the cases dealing with the Court's refusing to confirm a Sheriff's sale, and I point out specifically the case of Gunz vs. Chickering, 19 Wisconsin 2nd 625. In this case the Supreme Court sets down the rule of law when the trial Court may refuse to confirm a sale. Applying this rule the Court specifically finds from this record that there was no showing of mistake, misapprehension, or indavertence on the part of any interested parties or prospective bidders. The Court points out that these defendants who

are objecting to the confirmation of this Sheriff's sale were not even present at the last Sheriff's hale, nor was anyone present that made any bid in their behalf. Further, in the Gunz case, the Supreme Court states that under Wisconsin law the trial Court also has discretion to refuse to confirm such a sale even though there is no mistake, misapprehension, or inadvertence, where the sale price is not only inadequate, but is so grossly inadequate as to shock the conscience of the Court. In this case they refer to the Welfare Building and Loan Association vs. Gearhead and others, 235 Wis. 229, where the Supreme Court held that it is all settled in this State that mere inadequacy of the bid or consideration of a mortgage foreclosure sale does not ordinarily justify the Court in refusing to confirm a sale unless the inadequacy of the bid shocks the conscience of the Court or results in an injustice.

The Court specifically finds that the bid price is not so grossly inadequate as to shock the conscience of this Court, or to raise a presumption of fraud, inadvertence, or mistake.

Upon the record, and upon a complete consideration of all of the testimony presented, and upon this entire record:

IT IS ORDERED:

That the Sheriff's Sale is hereby confirmed forthwith. It is ordered that the deed held by the Clerk of the Court shall be delivered to the plaintiff. A Writ of Assistance will issue. The $10,000.00 down payment will remain with the Court. That the Court finds at this time that there is due the plaintiff the sum of $25,366.74 as of July 1, 1965, plus interest to this date. That counsel for the plaintiff will take steps to bring on by motion a hearing with reference to the final determination of the amount owing the plaintiff, his request for additional attorney's fees, and the adjudication of the surplus, if any, and a hearing with reference to anyone who has any interest in any surplus.

IT IS FURTHER ORDERED, that the Receiver's account as filed by the Receiver is approved. That upon payment into Court of the amount held by the Receiver, the said Receiver will be dismissed, his bond be discharged, and his account

approved in all respects. I believe his account includes his fees. Is that correct?

Mr. CHARNE: Yes, it does. He is asking $150.00 fees and $150.00 for his attorney.

COURT: That will be approved, and the balance in the Receiver's account will be considered at the next hearing with reference to disbursing the surplus. Mr. Charne, you will prepare the order and will you please include in the order all of the findings that the Court has made at this hearing?

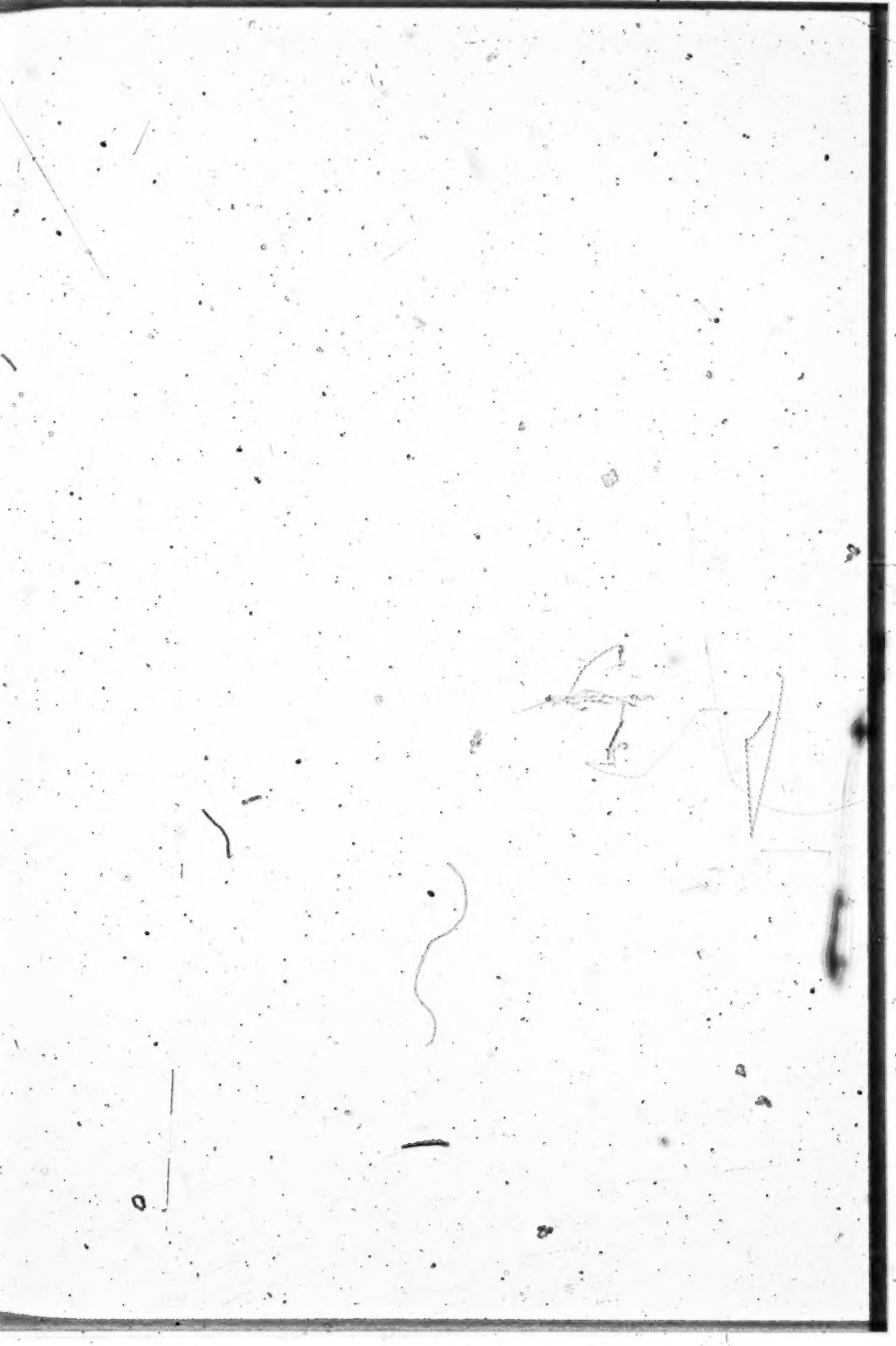
Mr. CHARNE: Yes, sir.

COURT: Are there any other findings that should be made at this time?

Mr. CHARNE: I don't believe so, your Honor.

COURT: Very well. Court is in recess.

* * * * * * *



SUPREME COURT, U. S.
APR 28 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1102

BYRON HAHN, also known as SOON K. HAHN, and SUSAN HAHN, his wife,

Petitioners,

v.

JOHN W. BIHLMIRE, Assignee of Lloyd D. Miller, Assignee of First National Bank of Madison, Wisconsin, Guardian of Harry Newman, Incompetent,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court, State of Wisconsin

BRIEF FOR RESPONDENT IN OPPOSITION

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HANNERSMITH-KORTMEYER CO. MILWAUKEE

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IN THE

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BYRON HAHN, also known as SOON K. HAHN, and SUSAN HAHN, his wife,

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court, State of Wisconsin

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

(1) Does this Court have jurisdiction to review, on a petition for a writ of certiorari, the decision of the Wisconsin Supreme Court in the case of *Bihlmire v. Hahn, et al,* 31 Wis. (2d) 537, 143 N.W. (2d) 433 (1966)?

(2) Were petitioners denied a fair trial under the Fourteenth Amendment of the United States Constitution when, having knowledge of all relevant facts and having the right to secure a different judge, they chose not to do so and the judge did not disqualify himself on his own motion?

STATEMENT OF THE CASE

The respondent, in clarification and amplification of the statement of the case contained in the petition, would like to call to the Court's attention various facts involving the case at bar.

The foreclosure proceedings involving the property which is the subject matter of these proceedings, were instituted on December 23, 1953. On May 10, 1954, a judgment of foreclosure was entered in the amount of $8,769.71 in favor of the then holder of the first mortgage and against the petitioners. The judgment also declared that there was due and owing the sum of $3,621.27 to the County of Walworth for back taxes (R. 107-111).

Although the petitioners could have redeemed the property during the eleven year period commencing with the day the judgment of foreclosure was entered and terminating with the confirmation of sale to the respondent, they did not do so. In addition, Mr. Hahn, one of the petitioners, never paid real estate taxes on the said property during this period (R. 101).

In February of 1960, Mr. Hahn deeded his interest in the property to Oriental Trading Corporation, which he wholly owned (R. 222). A notice of foreclosure sale dated June 22, 1960, was filed with the court (R. 113), but the sale was not held. In January of 1961, Oriental Trading Corporation deeded the property to Carol Lingott as security for a $10,000.00 loan (R. 222). On April 20, 1964, an order was entered substituting John Bihlmire as plaintiff as the assignee of Lloyd D. Miller. That same order added to the judgment taxes, interest and charges which had been paid by the mortgagee for the years 1950 through 1962, together with interest on the judgment, so that the mortgage amount was increased to $21,217.37 (R. 113-114). Thereafter, a sale was noticed and held on June 9, 1964. The sheriff's report of sale stated that the premises were struck off to the highest bidder, who was Byron Hahn, for the sum of $35,000.00 and the purchaser paid the sum of $4,000.00 as a deposit (R. 117-118). On July 6, 1964, Mr. Hahn paid Carol Lingott $5,000.00 and added $5,000.00 to the amount of the mortgage which she held on another parcel of property known as Stone Manor and Mrs. Lingott deeded the property back to Mr. Hahn (R. 222-223). On July 10, 1964, Mr. Hahn deeded the property to Jhung Do Corporation (R. 223).

Thereafter, a notice of application to confirm the sheriff's sale dated November 30, 1964, was served and filed (R. 119). The hearing on confirmation was held and the court entered the order confirming the sale on December 7, 1964 (R. 119). The order provided that Mr. Hahn, as the highest bidder, should pay the balance of the purchase price into court within ten days and that in the event Mr. Hahn failed to pay the balance of $31,000.00 into the court within the time set by the court,

the $4,000.00 would be forfeited (R. 120-121). Mr. Hahn did not pay the balance of the purchase price.

On January 7, 1965, a deed was recorded transferring the property back from Jhung Do Corporation to Mr. Hahn and on the same day a deed was recorded transferring the property from Byron Hahn and his wife to Transasia Trading Corporation (R. 223). On May 14, 1965, another order for sale of real estate was entered (R. 136) and the sale was noticed to be held on July 1, 1965. The said sale was held and the premises were struck off to John W. Bihlmire for $29,000.00 (R. 142). After an adjournment, the hearing on confirmation was held on August 5, 1965, at which time counsel for Mr. Hahn and Transasia Trading Corporation requested a further adjournment which the court denied (R. 160-163). Judge Zastrow ruled that the said sale should be confirmed (R. 101-106).

Petitioners, on page 7 of the petition, make reference to the securing of a mortgage commitment from First Federal Savings & Loan Association of Racine for $40,000.00. The implication is that this commitment was secured prior to December 8, 1964, the date on which the court gave the petitioners ten days in which to pay the balance owing. In fact, the application for the loan to First Federal Savings & Loan Association of Racine was dated July 29, 1965 (R. 169). At this time, petitioners' rights to purchase the property had already been forfeited (R. 120-121), and the property had been sold to the respondent (R. 142). In addition, at the time the application was made, the petitioners could not have even redeemed the property since they had previously transferred title to Transasia Trading Corporation (R. 223).

Petitioners also allege, on page 7 of their petition, that the court ordered a resale of the property with a min-

imum deposit of $10,000.00. This is in error. All that the court did was amend the judgment to remove the requirement that a minimum deposit of $4,000.00 would be required (R. 126-127). In Wisconsin, the amount of the deposit on a resale is discretionary with the sheriff and the County Court recognized this fact (R. 126-127).

Finally, petitioners state, on page 18 of their petition, that the Walworth County Court is informally withholding consummation of the sale to respondent pending the outcome of this petition. There is nothing in the record to support this contention nor is it correct. In fact, the sale has been consummated and all that remains is a determination as to the disposition of the funds on hand. Since this determination would of necessity require a finding as to the attorneys' fees, the County Court cannot proceed until this matter is determined so that attorneys' fees involved can be computed.

ARGUMENT

I.

This Court Lacks Jurisdiction to Examine the Decision of the Wisconsin Supreme Court on Two of the Three Grounds Asserted by Petitioners

The petitioners cite 28 USC, Sec. 1257(3) as the statutory provision which confers jurisdiction upon this Court to review, by writ of certiorari, the decision of the Wisconsin Supreme Court in the case of *Bihlmire v. Hahn, et al,* 31 Wis. (2d) 537, 143 N.W. (2d) 433 (1966). That part of 28 USC, Sec. 1257 relied upon by the petitioners, provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had,

> may be reviewed by the Supreme Court as follows: . . . (3) by writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The rights claimed upon which the petitioners rely for the granting of a writ of certiorari involve a denial to the petitioners of a fair trial within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution and a conflict in the procedures of the Wisconsin courts and the United States District Court for the Eastern District of Wisconsin in a pending bankruptcy action. The alleged denial of a fair trial arises out of the refusal of the trial court to disqualify itself or terminate certain communications written by the respondent and also the exclusion of certain evidence concerning the respondent and his connection with a bankruptcy proceeding instituted against one of the petitioners.

Before discussion can be had on the merits of petitioners' allegations, we must first ascertain whether this Court can consider, on a petition for a writ of certiorari, those federal questions presented by the petitioners. Under 28 USC, Sec. 1257(3), it is a jurisdictional requisite for a writ of certiorari that the title, right, privilege or immunity claimed and which is referred to as the federal question, shall have been specially set up or claimed in the state court proceeding. *Oxley Stave Company v. Butler County,* 166 U.S. 648 (1897), *Dewey v. Des Moines,* 173 U.S. 193 (1899), *Hiawassee River Power Company v. Carolina-Tennessee Power Company,* 252 U.S. 341 (1920).

As stated in *Hulbert v. City of Chicago,* 202 U.S. 275, 276 (1906):

> "In order to give this court the power to re-examine the judgment of the state court, the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way, and the right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claim."

As to what is meant by the term "specially set up or claimed", this Court in *Oxley Stave Company v. Butler County,* 166 U.S. 648 (1897), interpreted these words, when contained in a prior enactment, to mean as follows (p. 655):

> "The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially', that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference . . . . The jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

From the foregoing, it is clear, that the petitioners' right to rely on the federal questions asserted as grounds for certiorari under 28 USC, Sec. 1257(3) and this Court's jurisdiction to entertain a petition for a writ of

certiorari upon these grounds, is dependent upon whether these federal questions were specially set up or claimed in the state court. If in fact these questions were never presented to the state court, then this Court lacks jurisdiction to grant the petition for a writ of certiorari.

Petitioners, on page 18 of their petition, assert that the federal questions relied upon were raised in the state court proceedings. They allege that the question concerning the collusive instigation of bankruptcy proceedings was raised in the trial court by offer of proof (R. 205-207) and "cited as point 9 . . . in the respondent's brief". It is apparent that petitioners' reference to the respondent's brief is in error and the petitioners really meant point 9 of appellant's brief. It is clear from a review of this brief, which we believe is part of the record in these proceedings, that the petitioners never claimed in the said brief to the Wisconsin Supreme Court that the evidentiary ruling made by the trial court concerning the instigation of the bankruptcy action against one of the petitioners violated the petitioners' rights for a fair trial within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution. Also, the brief and the record is silent as to any claim by the petitioners that the procedure of the Wisconsin court was in conflict with the procedure of the United States District Court for the Eastern District of Wisconsin or was in conflict with any rights conferred upon the petitioners by a federal statute.

Point 9 of the appellant's brief, while alleging as error the failure of the court to receive evidence with respect to the instigation of the bankruptcy proceedings against one of the petitioners, asserted that the ruling that the said evidence was privileged within the meaning of Wisconsin Statutes, Sec. 325.22 (1963) was erroneous. The

brief is silent as to any authority or argument concerning a claim by the petitioners that the said evidentiary ruling violated their rights under the Fourteenth Amendment to the United States Constitution or that the Wisconsin procedure conflicted with the federal jurisdiction or abridged a right of the petitioners conferred by federal statute.

It is well settled in Wisconsin, that questions not briefed or argued will not be considered by the appellate court. *Public Service Employees Union v. Wisconsin Employment Relations Board,* 246 Wis. 190, 16 N.W. (2d) 193 (1944). Petitioners assert that these questions were argued but were never referred to or affirmatively passed on in the decision of the Wisconsin Supreme Court. A review of the record and of the appellant's brief submitted to the Wisconsin Supreme Court shows conclusively that these questions were never before the Court. As stated in *Keokuk & Hamilton Bridge Company v. Illinois,* 175 U.S. 626 (1900):

> "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it."

The third federal question involves a claim by the petitioners that they were denied a fair trial within the meaning of the Fourteenth Amendment of the United States Constitution by the trial judge's failure to disqualify himself or terminate the writing of certain letters by the respondent, which communications are set forth on pages 13 through 18 of the petition. This point was argued to the Wisconsin Supreme Court in the appellant's brief and, therefore, this Court would have jurisdiction to re-examine the judgment of the Wisconsin Supreme Court on this point alone.

The fact that the petition did raise one federal question before the Wisconsin Supreme Court, would not, however, justify the petitioners in arguing the additional federal questions set forth in their petition which are not connected with the federal question raised. This would be the case even though the record discloses facts upon which these questions might have been raised. *Dewey v. Des Moines,* 173 U.S. 193 (1899), *Keokuk & Hamilton Bridge Company v. Illinois,* 175 U.S. 626 (1900).

II.

Petitioners Waived Statutory Right to Have Case Heard by Another Trial Judge so They Cannot Claim Denial of Such a Right

During the course of the litigation, the respondent initiated various communications to the trial judge which are set forth on pages 13 through 18 of the petition. Each of these communications was made part of the record by the trial judge as can be seen from the citations to the record contained in the petition. In addition, the petitioners and their counsel were informed of the contents of these communications by the Court.

Although these communications were set forth in great particularity by the Court, the petitioners did not then assert that they were unable to secure a fair hearing from Judge Zastrow. They made this contention for the first time on the appeal to the Wisconsin Supreme Court.

Wisconsin Statutes, Sec. 261.08(1) (1963), provides that any party who has good reason to and does believe that he cannot have a fair trial because of the prejudice of the judge, can secure another judge to preside. No such affidavit was ever filed in this case against Judge

Zastrow by any party. The statute provides the mechanism for disqualifying the presiding judge in any given matter. If a litigant feels he is unable to receive a fair and impartial trial from a presiding judge, he may invoke the applicable statute and have the judge disqualified from hearing any further proceedings. However, under our system of justice an individual cannot wait to see the results of his case to determine whether he wants to file an affidavit of prejudice against the presiding judge. The petitioners had numerous opportunities to file an affidavit of prejudice against Judge Zastrow if they so desired. They did not choose to do so at any time throughout the entire history of these proceedings and should not be allowed to complain at this point in the proceedings that they were unable to get an impartial decision from Judge Zastrow.

In the case of *Baker v. Mueller,* 222 F. (2d) 180, 183 (7th Cir.) (1955), the Court stated:

> "In his brief in this court plaintiff contends that the district judge should have disqualified himself to sit in this case. This point was not raised before the district court and comes too late in this court."

The petitioners were fully appraised of the various communications during the course of the litigation. Since a procedure was available to the petitioners to have the proceedings transferred if they felt the judge would not be impartial, and since the petitioners could have objected to the competency of the judge but chose not to do so, they cannot now be heard to claim that they were denied a fair hearing. The right to correct the alleged abuse was present and the petitioners by not availing themselves of this right, waived any objection to the qualifications of Judge Zastrow and waived any

claim that they might have had that they were denied a fair hearing.

CONCLUSION

Respondent respectfully submits that for the reasons heretofore set forth, the petition for a writ of certiorari should be denied.

Respectfully submitted,

IRVIN B. CHARNE

Attorney for Respondent,
John W. Bihlmire